**Hillhaven Rehabilitation Center *and* United Nurses of Florida/United Health Care Employees, affiliated with Federation of Physicians and Dentists, NUHHCE, AFSCME, AFL–CIO.** Cases 12–CA–15919, 12–CA–16303, 12–CA–16411, 12–CA–17347, 12–CA–17543, and 12–CA–17692

November 9, 1997

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

This case[1] presents issues arising from the judge's findings that the Respondent committed numerous unfair labor practices, including the discharge of a charge nurse, prior to a 1994 representation election won by the Union, but that the Respondent did not violate the Act a year later by posting a letter stating that the Union was in criminal noncompliance with Florida law, by withdrawing from negotiations with the Union, and by thereafter withdrawing recognition of the Union's collective-bargaining representative status and making unilateral changes affecting unit employees.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. In particular, we reverse the judge and find that the posting of the letter violated Section 8(a)(1) of the Act and that the withdrawal from bargaining, withdrawal of recognition, and subsequent unilateral changes violated Section 8(a)(5) of the Act.

1. The Respondent operates a nursing home in Cape Coral, Florida. The Union initiated a campaign to organize certain of the Respondent's employees. On January 27, 1994, the Union petitioned for a Board election. The Board conducted the election on June 8, 1994, and shortly thereafter certified the Union as the bargaining unit employees' exclusive representative.[2]

For the reasons fully detailed in the judge's decision, we agree that the Respondent committed several unfair labor practices in the period leading up to the election. Specifically, the Respondent violated Section 8(a)(1) of the Act by soliciting employees to wear antiunion buttons, making various threats, imposing more onerous working conditions, engaging in surveillance of union activities, and announcing a dental plan benefit exclusively for nonunion employees. The Respondent also violated Section 8(a)(3) of the Act by disciplining Hector Rodriguez and by discharging Kim Stanton and Cynthia Magnus.

As to Charge Nurse Magnus, the Respondent admitted that it discharged her on November 8, 1993, for engaging in union activities, but it contends that she was a statutory supervisor excluded from the Act's protection. The judge found that recent Board precedent involving similar charge nurse supervisory issues mandated a conclusion that Magnus was a statutory employee, not a supervisor within the meaning of Section 2(11) of the Act.[3] For the following reasons, we agree.

The term ''supervisor'' is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgment. *Rest Haven Nursing Home*, 322 NLRB 210 (1996).

Magnus was a nonunit licensed practical nurse (LPN) who served as a shift charge nurse with responsibilities for the unit certified nursing assistants (CNAs) working at her station.[4] Her assignment and direction of CNAs' work does not qualify as a 2(11) authority because it did not require the exercise of

[1] On December 31, 1996, Administrative Law Judge Peter E. Donnelly issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

No exceptions were filed to the judge's findings and conclusions in sec. III,A,6 (solicitation to wear antiunion buttons); sec. III,A,13,1 (statements concerning Glenda Gregory's right to representation); sec. III,A,15 (discharge of Jill U'ren and Redding's 8(a)(1) statements); and sec. III,A,16 (discipline of Richard Smith).

[2] The bargaining unit consists of:

> All full-time and regular part-time certified nursing assistants, dietary aides, housekeepers, activities aide, cooks, maintenance assistant, medical records clerk, scheduling/supply purchasing clerk, data entry clerk, floor person, restorative aides, ward clerk, laundry employees, physical therapy aides and occupational therapy aides employed by the Employer at its Cape Coral, Florida, facility; excluding all licensed practical nurses, the receptionist, the accounts payable clerk, pool employees, professional employees, guards and supervisors as defined in the Act.

[3] The judge's analysis, including a footnote quotation from the dissenting opinion in *Providence Hospital*, 320 NLRB 717 (1996), suggests his disagreement with this precedent. It is, of course, well established that the judge has a duty to apply Board precedent, not the contrary views of a circuit court of appeals, much less those of an individual dissenting Board member. *Iowa Beef Packers*, 144 NLRB 615, 616–617 (1963).

[4] While only Magnus' employee status is in issue, the judge described the duties and activities of the Respondent's charge nurses, noting that the record did not differentiate Magnus' duties from those of the other charge nurses.

independent judgment on her part. Instead, Magnus and the other charge nurses used a set rotation in assigning CNAs to a particular block of patient rooms. See *Ten Broeck Commons*, 320 NLRB 806, 811 (1996) (assignments made on a monthly basis with routine rotation did not indicate the exercise of independent judgment) and *Evangeline of Natchitoches, Inc*., 323 NLRB No. 25 (Feb. 27, 1997) (LPN rotation of tasks among aides is not independent judgment). Similarly, Magnus' authority to make adjustments to the CNAs' assignments and to take corrective action based on patient needs was routine. *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996); *Altercare of Hartville*, 321 NLRB 847 (1996). As noted in *Providence Hospital*, supra, 320 NLRB at 729, the Board has:

> [long] distinguished supervisors who share management's power or have some relationship or identification with management from skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience, or skills . . . . The Board has also recognized that making decisions requiring expert judgment is the quintessence of professionalism; mere communication of those decisions and coordination of their implementation do not make the professional a supervisor. [Citations omitted.]

Here, Magnus' direction of CNAs, insofar as it was not merely clerical, involved only her expertise as an LPN. As such, we find that such assignment and direction does not involve the requisite exercise of independent judgment because it does not require anything ''beyond the professional judgment exercised by all [nurses].'' Id. at 732.

We also find that Magnus' role in the evaluation of CNAs did not qualify as supervisory authority. Like other charge nurses, she filled out written evaluations for CNAs in which she provided a numerical performance rating for each of 24 categories. She did not show or discuss these evaluations with unit employees. She merely submitted them to the nursing office without any recommendation regarding pay increases or promotions. The record indicates that Director of Nursing Denise Kay altered the figures on several evaluations submitted by Magnus. Furthermore, although Kay testified that a formula applied to the total point score of an evaluation determined an employee's wage increase, the judge found that the evidence did not support finding a uniform application of such a formula. Magnus credibly testified that she herself was never asked to apply the formula.

In sum, the record indicates that Magnus' superiors retained the authority to determine and effectuate any personnel actions flowing from the evaluations prepared by her. The Board has consistently declined to find supervisory status when charge nurses perform evaluations that do not, by themselves, affect other employees' job status. *Ten Broeck Commons*, supra, 320 NLRB at 813. We, therefore, conclude that Magnus' evaluations of CNAs did not manifest supervisory authority under Section 2(11) of the Act.[5]

Finally, we find that Magnus' preparation of disciplinary forms based on CNA misconduct did not demonstrate supervisory authority. The judge found that she was not consulted or advised as to any subsequent discipline actually imposed for the misconduct and that the record was insufficient regarding whether the Respondent's management was following Magnus' recommendations of termination when it subsequently terminated two employees. The Board does not find disciplinary notices to be proof of supervisory authority unless they result in personnel action without independent investigation or review by others. *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993).

Based on the foregoing, we agree with the judge that the record does not demonstrate that Magnus possessed any of the supervisory powers enumerated in Section 2(11) of the Act. She was, therefore, an employee entitled to the full protection of Section 7 of the Act. When the Respondent admittedly discharged her for engaging in protected union activities, it violated Section 8(a)(3) and (1) of the Act.[6]

2. After the Union's certification, the parties began negotiating for an initial collective-bargaining agreement on August 5, 1994. On July 19, 1995, almost 1 year later, they had yet to reach agreement. On about that date, the Respondent posted on a glass-enclosed employee bulletin board a letter that it had sent to Jack Seddon, the Union's executive director and a principal negotiator in bargaining with the Respondent. The letter stated:

> We have been advised by the State of Florida of the following:
>
> 1. That the United Health Care Employees Union is not a registered labor organization, as required by Chapter 447 of the Florida statutes, a second degree criminal misdemeanor; and

[5] In this regard, there is a marked contrast between this case and *Hillhaven Kona Healthcare Center*, 323 NLRB No. 202 (July 7, 1997), where the Board found that charge nurses were statutory supervisors based on their role in preparing evaluations of CNAs. In that case, the charge nurses independently prepared evaluations with numerical scores, and the total of those scores automatically determined wage increases without any further discretionary action by a higher official.

[6] Chairman Gould agrees that Magnus was not a 2(11) supervisor. He notes, however, that even if she were a supervisor, he would find discrimination against her to be unlawful if it reasonably could be inferred that the discrimination would chill the concerted or union activities of statutory employees. He disagrees with *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. sub nom. *Food & Commercial Workers Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988), to the extent that it limits the reach of the Act to such conduct.

> 2. That you, Jack Seddon, are not a registered business agent, as required by Chapter 447 of the Florida statutes, also a second degree criminal misdemeanor.
>
> While the State of Florida also advised us that as a result of these violations of Florida law, we have no obligation to deal with you or your organization until you are in compliance with these requirements, please state your positions on these matters and how you intend to comply.
>
> Once again it appears that the cavalier attitude evidenced by the union in non-complying with the law may adversely affect our residents, our employees and our business. I sincerely hope this does not continue.

The complaint alleged that the posting of this letter violated Section 8(a)(1) of the Act. The judge recommended dismissal of this allegation, finding no evidence that representations made in the letter were false, that the letter was posted for the purpose of undermining negotiations or the Union's bargaining status, or that it actually had that effect. We find merit in the General Counsel's exceptions on this point.

Regardless of what officials of the State of Florida may have told the Respondent, the Board has long held that an employer may not refuse to bargain with a duly selected representative of its employees on the grounds that the union has not secured a state license. *In the Matter of Eppinger & Russel Co*., 56 NLRB 1259, 1260 (1944) (Florida license requirement). In *Hill v. State of Fla, ex rel. Watson*, 325 U.S. 538 (1945), the Supreme Court held that union licensing requirements were ''repugnant to the National Labor Relations Act . . . [and] . . . inconsistent with the federally protected process of collective bargaining.'' See also *Thomas v. Collins*, 323 U.S. 516 (1945) (Texas statute requiring registration of union organizer contravenes First Amendment free-speech guaranty). Moreover, the Supreme Court of Florida held in *State v. Smith*, 123 So.2d 700, 703 (Fla. 1960), that the statute referred to in the Respondent's letter ''applies only to functions performed by business agents of labor unions which have no relation to collective bargaining.''

Not every misstatement of labor law to employees is an unfair labor practice. In this instance, however, the letter posted by the Respondent on the bulletin board conveyed the impression both that the Union had engaged in criminal misconduct and that this misconduct raised significant doubts about the Respondent's obligation to bargain with the Union. In finding no violation of Section 8(a)(1), the judge mistakenly relied on the absence of proof of antiunion motivation for the Respondent's posting of the letter, or of an actual antiunion impact on employees from this posting. The test of legality here does not require such proof. The test is an objective one; i.e., would the letter's posting reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights, specifically including the right to bargain collectively through a representative of their own choosing. We find that statements suggesting to unit employees that their representative had engaged in criminal conduct and that the Respondent had no obligation to bargain would reasonably tend to undermine their confidence in and support for the Union. This is so regardless of whether, as here, the Respondent continued to negotiate with the Union after it posted the letter. Based on all of the circumstances, we find that the posting of this letter violated Section 8(a)(1) of the Act.

3. At about the same time as the unlawful letter posting, bargaining unit employee Judy Sanford began to solicit unit employees to sign a petition stating that: ''We, the employees of Hillhaven do not wish to be represented by Mr. Seddon so here we petition.'' The judge found that the unit at this time consisted of 69 employees. On July 24, Sanford presented an employee petition with 36 signatures to Leo Redding, the Respondent's administrator. On July 25, Sanford submitted two more petitions with six additional signatures. On July 28, she submitted a petition combining all the signatures.

On August 15, the Respondent referred to the decertification petition as justification for withdrawal of its bargaining proposals. Then, by letter dated September 7, the Respondent withdrew recognition from the Union ''based on objective considerations your Union does not represent a majority of employees in the certified unit.'' Later in the year, the Respondent refused a request to meet with the Union about grievances relating to unit employees. It also unilaterally notified unit employees that their medical and dental insurance premiums would increase.

On expiration of the certification year and in the absence of a collective-bargaining agreement, an incumbent union is still presumed to enjoy majority support among unit employees whom it represents. An employer may rebut this presumption and withdraw from the bargaining relationship if it can show either that the union in fact no longer has the support of a majority of the unit employees, or that the employer has a reasonably based doubt, based on objective considerations, as to the union's continued majority status. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 778 (1990). Any such doubt, however, must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. E.g., *Pitts-*

*burgh & New England Trucking Co.*, 249 NLRB 833, 836 (1980).

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support. In cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995). In this regard, the Board considers several evidentiary factors:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of a detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the Union. [Citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).]

As previously discussed, the judge found that the posting of the Respondent's letter on July 19 was not an unfair labor practice. We have reversed this finding. He further stated that even if he had found the posting to be unlawful, he would not have found that it contributed to employee dissatisfaction expressed in the decertification petition. We reverse on this point as well. Applying *Master Slack*, supra, we find a strong causal connection between the Respondent's unlawful posting of the letter on July 19 and the petition.

In regard to timing, the record shows that employee Sanford first submitted the petition to the Respondent just 5 days after this unfair labor practice.[7] See *Pirelli Cable Corp.*, 323 NLRB No. 169, slip op. at p. 2 (June 18, 1997) (only 2 months between unlawful act and employees' signing of employee petition). As for the nature of the violation, its tendency to undermine the Union, and its overall effect on employee morale, we have already expressed the view that the posting directly undercut the Union in the eyes of the unit employees by denying the very essence of its representative role. As in *Williams Enterprises*, supra, 312 NLRB at 940, where the employer stated that it would remain nonunion, ''such a message does not just entail some discrete aspect of unionization . . . [i]t strikes at the heart of the relationship between employees and the Union.'' Furthermore, the suggestion that the Union had engaged in criminal conduct would reasonably tend to discourage employees from continued association with it. Finally, the judge failed to note that at the time of the letter's posting, the Respondent's several preelection unfair labor practices remained unremedied. In these circumstances, the suggestion that the Respondent no longer had an obligation to bargain would reasonably threaten the possible resumption of unlawful retaliation against those who persisted in supporting the Union.

In sum, we find that unlawful posting of the Respondent's letter would reasonably tend to encourage unit employees to sign the decertification petition in order to disassociate themselves from the Union and to avoid possible retaliation from the Respondent. Evidence that Sanford herself initiated the petition effort for reasons other than the Respondent's unfair labor practices, or that these reasons may also have influenced other employees who signed the petition does not negate the factors supporting the finding of a causal relationship between the Respondent's unlawful conduct and the employees' expression of dissafection. See *Williams Enterprises*, supra at 940. We, therefore, find that the unlawful letter posting, as well as the other unremedied unfair labor practices, tainted the decertification petition. Consequently, the Respondent was precluded from relying on a petition resulting at least in part from its own unfair labor practices. Its withdrawal from bargaining, withdrawal of recognition, and subsequent unilateral changes and refusal to discuss employee grievances with the Union violated Section 8(a)(5) and (1) of the Act.

## ORDER

The National Labor Relations Board orders that the Respondent, Hillhaven Rehabilitation Center, Cape Coral, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining employees because of their union sentiments or activities.

(b) Imposing more onerous working conditions on employees because of their union sentiments or activity or for having given testimony under the Act.

(c) Engaging in surveillance of the union activities of employees.

(d) Announcing the implementation of a dental plan exclusively for nonunion employees.

(e) Soliciting employees to wear antiunion buttons.

(f) Threatening employees with additional training and increased scrutiny of their work because of their union activity.

(g) Threatening to change the lunchtimes of employees because of their union activity.

(h) Threatening to reduce the work hours of employees because of their union activity.

(i) Telling employees that the employee of the month award would be withdrawn because of their union activity.

[7] The record indicates that Sanford might have begun circulating her petition 2 days before the letter posting, but a majority of the unit employees had not signed the letter until July 24, when Sanford first presented her petition to the Respondent.

(j) Telling unit employees they have no right to union representation.

(k) Telling employees that they will not get a wage increase because they selected union representation.

(l) Posting a letter stating that because of the Union's noncompliance with state registration requirements, it had no obligation to bargain with the Union.

(m) Withdrawing and withholding recognition from and refusing to bargain with the Union.

(n) Failing and refusing to bargain by unilaterally, without notice to or negotiating with the Union, increasing employee health insurance premiums.

(o) Failing and refusing to bargain in good faith with the Union by failing and refusing to meet with the Union over employee grievances.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Cynthia Magnus and Kimberly Stanton full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Cynthia Magnus and Kimberly Stanton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Cynthia Magnus and Kimberly Stanton, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the disciplinary action taken against Hector Rodriguez, and within 3 days thereafter notify the employee in writing that this has been done and that this disciplinary action will not be used against him, in any way.

(e) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if any understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nursing assistants, dietary aides, housekeepers, activities aide, cooks, maintenance assistant, medical records clerk, scheduling/supply purchasing clerk, data entry clerk, floor person, restorative aides, ward clerk, laundry employees, physical therapy aides and occupational therapy aides employed by the Employer at its Cape Coral, Florida, facility; excluding all licensed practical nurses, the receptionist, the accounts payable clerk, pool employees, professional employees, guards and supervisors as defined in the Act.

(f) On request, rescind the unilateral changes in terms and conditions of employment found unlawful in the Board's decision and make whole any unit employees who have been detrimentally affected by the Employer's unlawful unilateral action, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(g) On request, meet with the Union for the purpose of discussing grievances relating to unit employees.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its operations in Cape Coral, Florida, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 1993.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, dissenting in part.

1. Contrary to the majority, I would find that Charge Nurse Cynthia Magnus was a supervisor, and consequently, that her discharge for engaging in union activity did not violate the Act.

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

The administrative law judge found that, consistent with the authority and responsibilities set out in their job descriptions, the charge nurse licensed practical nurses (LPNs) exercise overall authority on their nursing stations, including assignment of certified nursing assistants (CNAs) whom they supervised to patient rooms, and making adjustments to these assignments. The judge also found that between the hours of 5 p.m. and 9 a.m., the charge nurses are the highest ranking employees at the facility. Although higher management was available by telephone through an ''on call'' system, the charge nurses do all of the immediate assignment and direction of work during their hours of responsibility.

The judge further found that the charge nurses could request or authorize that the CNAs work overtime (but not require it), and that all of the charge nurses, including Magnus, had exercised this authority. The charge nurses prepare evaluations of the CNAs whom they supervise, which are used (although not always strictly according to a prescribed point system) to determine raises or promotions. The charge nurses, including Magnus, had the authority to and did make out disciplinary forms on their supervisees. The record shows that in at least two instances, employees who Magnus had recommended be terminated, were terminated.

Based on all of the above, it is clear that the charge nurses, including Magnus, have the authority to, and indeed do, carry out numerous supervisory functions. I, therefore, find that Magnus was a supervisor, and, accordingly, that her discharge did not violate the act.

2. In agreement with the judge, and for the reasons given by him, I would find that the Respondent's posting on the employee bulletin board of a July 19, 1995 letter to the Union did not violate the Act. I further agree with the judge that the record does not support a finding that this letter was the cause of employee disaffection for the Union, or that it tainted the decertification petitions relied on to support the Respondent's good faith doubt of the Union's majority status. Accordingly, I would not find that the Respondent's withdrawal of outstanding contract proposals and withdrawal of recognition violated the Act.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discipline employees because of their union sentiments or activities.

WE WILL NOT impose more onerous working conditions on employees because of their union sentiments or activity or for having given testimony under the Act.

WE WILL NOT engage in surveillance of the union activities of employees.

WE WILL NOT announce the implementation of a dental plan exclusively for nonunion employees.

WE WILL NOT solicit employees to wear antiunion buttons.

WE WILL NOT threaten employees with additional training and increased scrutiny of their work because of their union activity.

WE WILL NOT threaten to change the lunchtimes of employees because of their union activity.

WE WILL NOT threaten to reduce the work hours of employees because of their union activity.

WE WILL NOT tell employees that the employee of the month award will be withdrawn because of their union activity.

WE WILL NOT tell employees that they have no right to union representation.

WE WILL NOT tell employees that they will not get a wage increase because they selected union representation.

WE WILL NOT post a letter stating that because of the Union's noncompliance with state registration requirements, we have no obligation to bargain with the Union.

WE WILL NOT withdraw and withhold recognition from and refuse to bargain with the United Nurses of Florida/United Health Care Employees, affiliated with Federation of Physicians and Dentists, NUHHCE, AFSCME, AFL–CIO as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time certified nursing assistants, dietary aides, housekeepers, activities aide, cooks, maintenance assistant, medical records clerk, scheduling/supply purchasing clerk, data entry clerk, floor person, restorative aides, ward clerk, laundry employees, physical therapy aides and occupational therapy aides employed by us at our Cape Coral, Florida, facility; excluding all licensed practical nurses, the receptionist, the accounts payable clerk, pool employees, profes-

sional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive bargaining agent of our employees in the above appropriate unit by failing and refusing to meet with the Union over employee grievances.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive bargaining of the unit employees by unilaterally increasing their health insurance premiums.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cynthia Magnus and Kimberly Stanton full reinstatement to their former jobs or, if such jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cynthia Magnus and Kimberly Stanton whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Cynthia Magnus and Kimberly Stanton, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them. in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the disciplinary action taken against Hector Rodriguez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind the unilateral changes in terms and conditions of employment found unlawful in the Board's decision and make whole any unit employees who have been detrimentally affected by our unlawful unilateral action, with interest as provided in the Board's decision.

WE WILL, on request, bargain with the United Nurses of Florida/United Health Care Employees, affiliated with Federation of Physicians and Dentists, NUHHCE, AFSCME, AFL–CIO as the exclusive collective-bargaining representative of the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, meet with the Union for the purpose of discussing grievances relating to unit employees.

HILLHAVEN REHABILITATION CENTER

*Evelyn Korschgen, Esq*., for the General Counsel.
*J. Steve Warren, Esq*., of Greenville, South Carolina, for the Respondent.
*Jack Seddon, Esq*., of Tallahassee, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. Upon charges filed by United Nurses of Florida/United Health Care Employees, affiliated with Federation of Physicians and Dentists, NUHHCE, AFSCME, AFL–CIO (the Union or the Charging Party), a complaint and, subsequently, a series of amended complaints were issued alleging that Hillhaven Rehabilitation Center (the Employer or Respondent), engaged in various misconduct set out in the various complaints and amended complaints, constituting interference with the organizational rights of employees in violation of Section 8(a)(1) of the Act. Further, that Respondent violated Section 8(a)(3) and (4) of the Act by engaging in various discriminatory conduct against its employees, including the discharges of employees Cynthia Magnus, Kimberly Stanton, and Jill U'Ren.

It is further alleged that Respondent violated Section 8(a)(5) of the Act by refusing to meet and bargain with the Union and by withdrawing recognition from the Union; by failing and refusing to meet with the Union concerning employee grievances; and by announcing increases in employee insurance premiums without offering the Union an opportunity to bargain thereon.

Pursuant to notice, a hearing was held before me on February 5, 6, and 7, March 25–28, April 29–30, and May 1, all in 1996. Briefs have been timely filed by the General Counsel and Respondent, which have been duly considered.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is, a Delaware corporation, operating a nursing home facility in Cape Coral, Florida. During the past calendar year in the conduct of its business operations, Respondent derived gross revenues in excess of $250,000 and purchased and received at its Cape Coral, Florida facility goods valued in excess of $10,000 directly from points outside the State of Florida. The complaints allege, the answers admit, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. LABOR ORGANIZATION

The complaints allege, the answers admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *Facts*[1]

#### 1. Respondent's operations

Hillhaven Rehabilitation Center is a 120-bed rehabilitation center and nursing home located in Cape Coral, Florida, where it provides short-term and long-term patient care.

The facility is generally divided into two wings or nursing stations. station I provides skilled care for some 40 patients, and station II provides intermediate care for about 40 patients.

General supervision of the entire facility resides in the administrator. Next in the hierarchy is the director of nursing (DON) who reports to the administrator and an assistant director of nursing (ADON) who reports to the DON. The administration also includes a staff development coordinator (SDC) who is responsible for new employee orientation and staff development and training.

Both stations I and II operate under the supervision of a charge nurse for each shift. There are three shifts, the day shift (7 a.m. to 3 p.m.), the evening shift (3 to 11 p.m.), and the night shift (11 p.m. to 7 a.m.).

The assignment of the unit charge nurses for the various shifts is made by the DON.

#### 2. Collective-bargaining history

A petition for an election was filed on January 27, 1994.[2] Thereafter, a representation hearing was held on February 18, 19, and 25, 1994. A Decision and Direction of Election issued on May 12, 1994, and an election was held on June 8, 1994, which the Union won. No objections to the election were filed and the Union was certified on June 21, 1994, as the collective-bargaining representative for a unit consisting of:

> All full-time and regular part-time certified nursing assistants, dietary aides, housekeepers, activities aide, cooks, maintenance assistant, medical records clerk, scheduling/supply purchasing clerk, data entry clerk, floor person, restorative aides, ward clerk, laundry employees, physical therapy aides and occupational therapy aides employed by the Employer at its Cape Coral, Florida, facility; excluding all licensed practical nurses, the receptionist, the accounts payable clerk, pool employees, professional employees, guards and supervisors as defined in the Act.

Negotiations began about August 5. More than a year later on about August 16, 1995, the Respondent withdrew its contract proposals and on September 7, 1995, withdrew recognition from the Union based on what it alleged to be a good-faith doubt that the Union represented a majority of the Respondent's employees in an appropriate unit based on an employee petition which the Respondent contends supported its good-faith doubt.

#### 3. Alleged charge nurse supervisory status and discharge of Cynthia Magnus

##### a. *Facts*

The record discloses that Magnus was employed by Respondent on March 20, 1989, as a licensed practical nurse (LPN).

Magnus as well as other LPNs and some registered nurses worked as unit/station charge nurses.[3] These nurses were responsible for the overall supervision of stations I and II on their shifts. There was one charge nurse for each of the three shifts on both stations.

As noted above, the assignment of charge nurses is made by the DON. A schedule of those assignments is issued by the nursing office. It is distributed by the scheduling clerk. This schedule shows the designated charge nurse for each shift on stations I and II as well as the certified nursing assistants (CNAs) assigned by shift and station. There are some five to eight CNAs on each station for the day and afternoon shifts and about three to four CNAs on the night shift. They perform most of the direct patient care.

From the end of the normal workday at 5 p.m. until 9 a.m. the following morning, the charge nurses are the highest ranking employees at the facility, although Respondent has an ''on call'' system rotated between the ADON, special unit coordinator (SUC) and the SDC, whereby higher authority can be consulted by the unit charge nurse by telephone.

The job description for CNAs provides that they report to the charge nurse. The job descriptions for LPNs, signed by Magnus on March 20, 1989, provides, in pertinent part:

> RESPONSIBLE FOR:
>
> All nursing and personnel on unit and management of all patient care during tour of duty.
>
> 1. Responsible for the supervision of the total nursing unit (beds) during their tour of duty.
>
> 2. Supervises, teaches and counsels all the nursing personnel providing care to patients on unit.
>
> 3. Makes daily rounds to each patient to evaluate patient needs and effectiveness of nursing care provided.

[1] There is conflicting testimony regarding some of the allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically upon their demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161 (1966).

[2] All dates refer to 1994 unless otherwise indicated.

[3] There are other charge nurses who operate under the supervision of the unit charge nurse, such as ''team,'' ''medications,'' or ''treatment'' charge nurses, depending on their duties. Their status is not in issue. The term ''charge nurse'' as used herein refers to unit/station charge nurses.

4. Makes all nursing assignments for assigned staff consistent with their education, preparation and experience.

. . . .

MANAGEMENT

1. Prepares written job performance evaluations. The evaluations prepared by the charge nurse are relied upon for transfers, assignments and/or terminations.

2. Has authority to discipline employees and/or to effectively recommend disciplinary actions.

3. Has responsibility to recommend terminations. Such recommendation should be submitted in writing to the Director of Nursing Services.

4. Has authority to call in nursing personnel when necessary to insure adequate staffing.

5. Has authority to assign lunch and coffee breaks.

The assignment of a CNA to a block of patient rooms is made mostly by the charge nurse on a rotational basis.

During the shifts, the charge nurse has the responsibility of supervising the patient care activities of the CNAs and has the authority to take corrective action when necessary. The charge nurse may also adjust room assignments based upon patient needs during the shift. CNAs are required to maintain and initial ''Alternative Flow Sheets'' indicating that the patient care tasks thereon have been performed. The charge nurse is responsible for initialing the alternative flow sheets to verify that the tasks were actually performed.

The charge nurse has the responsibility of resolving transitional patient care problems from the prior shift. The charge nurse performs other administrative tasks, including the taking of physicians' orders, making patient progress notes, and ordering medications from pharmacies.

At the beginning of each shift, the charge nurse prepares and posts a daily group assignment sheet wherein CNAs are assigned their duties for the day on the shift, including the specific patient rooms for which they will be responsible. The unit charge nurse also assigns breaks and lunchtimes for each of the CNAs.

As to the matter of timecards, this is the responsibility of the unit charge nurse and when errors are made to a timecard, to sign an ''Explanation of Error'' form correcting the error and, without more, the error is corrected at the nursing office.

The unit charge nurse also verifies the hours worked by the CNAs by signing a certification sign-in sheet at the end of each shift.

With respect to calling in replacements for absent CNAs, it appears that at least in recent years, since the arrival of DON Denise Kay, it has been necessary to first obtain authorization from the nursing office or, after normal work hours, from the on-call supervisor.

Schedules made up in the nursing office by the DON contain a sentence reading: ''Please don't replace call-offs without prior approval from on-call nurse.'' Kay, however, testified that more senior unit charge nurses had the authority to call in replacement CNAs without consulting anyone. In this regard, I conclude that apart from whatever authority to call in replacement CNAs other charge nurses had, Magnus understood and exercised only the authority to call in replacement CNAs after obtaining authority from the nursing office or on-call nurse to do so.

Once having obtained that authority, it appears that Magnus, as well as other unit CNs, would consult the 2-week schedule to determine who was off that day and would then utilize the ''call-in box'' containing telephone numbers for all employees and would go to the first name among those scheduled to be off and ask that person to come in. If that person declined, the charge nurse went to the next in order until a replacement was obtained.

It appears that CNAs could not be ordered by the charge nurse to work overtime, and there is conflicting testimony about whether charge nurses, without prior approval, could even request or authorize overtime for CNAs. Magnus testified that she did not have such authority and Denise Kay, DON, whose testimony I found more convincing in this regard, testified that all the charge nurses, including Magnus, had exercised such authority.

It is undisputed that charge nurses were responsible for making out written evaluations for the CNAs they supervised. The written evaluations provided for grading with a numerical performance level or points for each of the 24 categories evaluated. Magnus testified that while she made out the evaluations, she did not discuss them with the CNAs evaluated and simply turned them into the nursing office. She did not recommend raises or promotions based on the evaluations and was not aware what raises, if any, were based on the evaluations.

Kay testified that wage increases for CNAs were based on applying a formula to the total points. However, Magnus testified that she was never asked to apply the formula, and those evaluations in evidence do not support the conclusion that the application of the formula uniformly produced the same level of wage increases.

With respect to employee discipline, it appears that charge nurses have the authority to issue disciplinary action notices to those CNAs under their supervision without prior consultation with any higher authority. Magnus's written self-evaluations suggest that she was aware that she had this authority and that she exercised it as necessary.

Magnus concedes that on her own authority, she made out disciplinary forms to report employee misconduct to the nursing office. However, she did not discuss it with the employee but simply recorded it and then turned the disciplinary form into the nursing office. She was not consulted thereafter or advised what, if any, disciplinary action was taken although it appears that she had recommended the termination of some employees and, at least in two instances, those employees had been terminated. The record is insufficient to determine whatever impact Magnus's recommendation may have had on the decision to discharge.

b. *Discussion and analysis*

The record establishes that the charge nurses, including Magnus, exercised overall supervisory authority on their nursing stations on each of three shifts and directed the activity of all the CNAs employed on that shift in discharging patient care responsibilities.

At times, mostly on the afternoon and night shifts, charge nurses were the highest management authority at the facility.

The authority of the charge nurses set out in writing in the LPN job description noted above appears to provide for the exercise of substantial authority by LPNs, including the charge nurse responsibilities as set out therein.

The authority of the charge nurses extends to the assignment of CNAs to patient rooms and to make adjustments in their assignments as necessary. The charge nurses have the authority to take corrective action with respect to patient care activity as warranted.

Charge nurses are responsible for attesting in writing, each day, that the CNAs have performed their assigned duties as set out in the ''Alternative Flow Sheets.''

While it appears that charge nurses are presently required to contact ''on-call'' authority before replacing absentees, they are responsible for selecting and contacting replacements. Charge nurses also authorize overtime when necessary to cover the work.

In addition, as set out above in greater detail, the charge nurses issue written evaluations and issue, on their own authority, written disciplinary actions.

The exercise of authority set out above seems to suggest that charge nurses exercise supervisory authority. However, based on outstanding Board precedent, which I am constrained to follow, while the Board might concede that these charge nurses assign and direct the activities of CNA employees, it would nevertheless conclude that the assignment and direction was ''routine'' and did not involve the use of ''independent judgment'' contemplated by the Act. *Providence Hospital*, 320 NLRB 717 (1996).[4]

Again, in *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996), on facts much the same as those in the instant case, the Board, in affirming Administrative Law Judge Michael O. Miller, reiterated its position, holding, in a footnote response to Member Cohen's dissent:

> After reviewing this proceeding in light of *NLRB v. Health Care & Retirement Corp. of America*, supra, and our recent decision in *Ten Broeck Commons*, 320 NLRB [806] (1966), we are satisfied that the judge properly found that alleged discriminatees Kristal Sue Mays and Ramona G. Walter were statutory employees while working as charge nurses at the Respondent's nursing home. Contrary to our dissenting colleague, we agree with the judge that the charge nurses' roles in assigning and directing the work of the Respondent's certified nurses aides (CNAs) does not constitute supervisory authority. The evidence establishes that, as in *Ten Broeck Commons*, supra, the CNAs' duties are repetitive and require little skills. Thus, we conclude that the assignment and direction the charge nurse gives these employees does not involve the exercise of independent judgment. Their authority to decide when aides can take their breaks, to permit aides to leave early, to authorize overtime pay, to send home aides who are impaired by substance abuse, and to request that employees work additional shifts also is routine in nature. Additionally, we stress, as did the judge, that there is no showing that the verbal and written disciplinary warnings the charge nurses issue independently result in adverse action to the CNA without further review by higher authority.

It is necessary therefore to evaluate the nature of the assignment and direction exercised by the charge nurses in the instant case.[5] Based on the relevant considerations recited above, I find that the authority set out by the Board in the cases cited above, when applied to the instant case, requires me to conclude, based on that precedent, that the assignment and direction of CNAs exercised by the charge nurses do not involve the exercise of independent judgment and that LPN Charge Nurse Magnus is an employee and not a supervisor within the meaning of Section 2(11) of the Act.[6]

4. Surveillance allegations

a. *Facts*

Some employees, specifically CNAs Jill U'Ren, Richard Smith, Kathy Mullins, and Cheryl Rogers testified that for about 2 weeks prior to the election on June 8, Redding and Kay were frequently present at the rear of the facility, in the vicinity of the timeclock, at those times when the shifts were changing. Further, that this had not previously been the case nor did the practice continue after the election. It is conceded that the security guards, usually one at a time, patrolled the facility during the week prior to the election and on election day and not thereafter. These facts are essentially undisputed.

In this regard, Redding did not deny his appearances and testified that it was his practice from the time he was employed by Respondent to stand near the rear of the facilities where he worked for the purposes of greeting employees as they came to work.[7] Security guards were hired as a response to complaints from the families of the patients who had been handbilled at the facility and to ensure the security of the building and the employees.

b. *Analysis and conclusions*

Having reviewed the entire record concerning this allegation, I am persuaded that there was a marked increase in the

[4] Board Member Cohen dissented from this conclusion and would find that such assignment and direction of subordinates by charge nurses did establish supervisory status. In his dissent, he states:

> Before beginning my analysis, it is instructive to reflect upon the legal context in which this issue arises. In *NLRB v. Health Care & Retirement Corp*., 114 S. Ct. 1778 (1994), the Board contended that certain charge nurses were not supervisors. The Board did not challenge the proposition that the nurses exercised powers under Section 2(11), and the Board did not argue that the nurses lacked independent judgment in this regard. Rather, the Board maintained that the exercise of the power was in the interest of the patient, and not in the interest of the employer.
>
> The Supreme Court rejected the argument. As the Court pointed out, ''patient care is the business of a nursing home and it follows that attending the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer.''

Thus, the Board was unsuccessful in its effort to manipulate the phrase ''in the interest of the employer.'' My colleagues, undaunted, now seek to achieve the same result through a misinterpretation of the phrase ''independent judgment.'' The effort is no more successful.

[5] While the General Counsel contends only for Magnus's employee status as an individual, there is nothing of substance in this record to distinguish her duties from the duties of charge nurses generally, and my analysis of charge nurse duties generally applies to Magnus individually.

[6] There is no need to consider the discriminatory nature of Magnus's discharge since Respondent, in its answer, admits she was discharged because of her union activities.

[7] Kay did not testify concerning this allegation.

appearance of management officials in the timeclock areas in the weeks preceding the election, and I am not convinced by Redding's testimony that he routinely attended shift changes, at least not with this degree of frequency. Nor am I persuaded by the unsupported testimony of Redding that the hiring of plant guards was a bona fide response to either complaints by patients' families or to handbilling at the facility.

In short, I conclude that Respondent, by the increased presence of management officials at shift changes and the hiring of security guards engaged in an unlawful surveillance of employees to discourage support for the Union.

5. Announcement of a dental plan

a. *Facts*

It is undisputed that Respondent announced to employees in May 1994, by a posting and by a notice with their paychecks, that a dental plan was to be implemented for all eligible nonunion employees at the Hillhaven facility to become effective June 1.

b. *Analysis and conclusions*

In my opinion, the coercive effect of this announcement is apparent, coming as it did at a crucial time in the organizational effort shortly before the election on June 8. This plan was a benefit available only to nonunion employees. Since it was not available to union employees, the announcement of this benefit was an inducement to refrain from supporting or to withdraw support from the Union. It is not clear whether the term ''nonunion'' employees was intended to exclude the entire voting unit or only those within the unit supporting the Union but, in any event, this announcement, immediately preceding the election, unlawfully interfered with the right of unit employees to select union representation.

6. Solicitation to wear antiunion buttons

a. *Facts*

Glenda Gregory, a laundry worker, testified that prior to the election on June 8, she was approached by Kay while she was working. Kay asked her if she would like a ''Vote No'' button. Gregory declined, whereupon Kay ''just looked'' and went on.

Kimberly Stanton, a CNA, testified that she also was approached by Kay about a week before her discharge on May 31, and that Kay handed her a ''Vote No'' button. Stanton, who was already wearing two union buttons, told her that she did not want to wear it, whereupon Kay gave her a ''dirty look.'' Kay did not testify concerning these allegations, and this testimony is not otherwise rebutted.

Jill U'Ren, a CNA, testified that Redding approached her as she was working at her station some 2 or 3 weeks before the election and asked her if she would wear a ''Just Say No'' button. U'Ren replied that she did not think it was appropriate for either side to wear buttons in the workplace. While Redding denied offering any employee a union button, he testified that he did distribute ''Vote No'' buttons, to some 15 to 20 employees at their request. Having reviewed the relevant testimony, I conclude that U'Ren's recitation is more credible.

b. *Analysis and conclusions*

The Board has held that it is unlawfully coercive for employers to solicit employees to wear proemployer items on the theory that such solicitation constitutes an effort by the Employer to put pressure on employees to disclose their union sentiments. The undisputed or credited testimony cited above falls clearly within that prohibited type of solicitation and violates Section 8(a)(1) of the Act. *Lott's Electric Co*., 293 NLRB 297, 304 (1989).

7. Housekeeping department—threats, coercion, and discrimination

a. *Facts*

Pursuant to the processing of the representation case, a hearing was held on Friday, February 25. In attendance at the hearing were, among others, housekeeping employees Carol Wright and Hector Rodriguez. Carol Wright, a housekeeping employee since 1991, testified on behalf of the Union. Rodriguez, although in attendance, did not testify. Wright was off duty on the following weekend but when she returned to work on Monday, February 28, Redding spoke to her, saying that he would personally be inspecting her rooms despite the fact that Wright's supervisor was housekeeping and Laundry Supervisor David Sims.[8] He criticized her for not doing a proper job and told her that she needed to be retrained. She asked Redding why this was necessary after all these years and Redding replied that it had nothing to do with her testimony at the hearing; that he had dealt with unions with before and they did not scare him.

During the following week, Redding watched her as she worked on several occasions, checking for dirt with his finger, criticizing the way she mopped and telling her she would have to be retrained. When Wright said that she thought Redding was angry at her for testifying at the hearing, he responded, ''Yes, I'm not afraid of the Union.''

Redding testified that he was dissatisfied with the performance of the housekeeping department and its supervisor, Sims, and that he had received complaints about the housekeeping department from other people. Also, that he did not threaten any employee with retraining, but only offered retraining to them as a way to improve their skills.

b. *Discussion and analysis*

The timing of Redding's statement and actions, coming as they did on the heels of the representation hearing, as set out above, suggest that they were prompted by the participation or attendance of Wright and Rodriguez at the hearing. I note that while Redding testified that he was motivated by the housekeeping department's poor performance, he took no corrective action from the time he became administrator on November 8, 1993, until immediately after the representation case hearing and then took the unusual step, as administrator, to intervene personally in the direction of work performed by individual housekeeping department employees. In these circumstances, I conclude that Redding's conduct in threatening

[8] Rodriguez testified that Redding said basically the same thing to both himself and Wright in a conversation during the week of February 28.

additional training, as well as monitoring the work of individual employees, violates Section 8(1) of the Act.[9]

8. Lunch breaks

a. *Facts*

Wright also testified that she was told by Sims shortly after she had testified at the representation case hearing that it would be necessary to change the time of the lunchbreaks in the housekeeping department.[10] At the time, all the housekeeping employees took their lunchbreaks from noon to 12:30 p.m. The new schedule being advanced by Sims changed the hours and Wright was scheduled from 12:15 to 12:45 p.m. Wright complained to Sims that the scheduling was ridiculous, and Sims responded that Redding had told him that it had to be done. It does not appear, however, that the new schedule was implemented. Wright's testimony about the scheduled change in lunchbreaks for the housekeeping department is substantially corroborated by Rodriguez. Sims did not testify at the hearing.

Redding testified that the proposed changes in lunchbreak times were designed to ensure that lunchtimes were being taken when lunch was being served to patients, and work could not be done on the floors at those times anyway, rather than being taken at other times when lunch was not being served to patients and housekeeping employees could work on the floors. Theoretically, the new scheduling would increase the time that housekeeping staff could work on the floors.

However, it is significant to note that there appears to have been no previous effort to correct the problem and the evidence is insufficient to show that the proposed changes in lunchtimes would have produced the intended results.

b. *Discussion and analysis*

In my opinion, and based on a review of the entire record, the proposed changes appear to have been a reaction by Redding, accomplished through Sims, and motivated by the attendance of Wright and Rodriguez at the representation hearing, and I reject as insufficient the rationale offered by the Respondent.

9. Reduced hours

a. *Facts*

Housekeeping employee Glenda Gregory was a laundry worker. She testified that Sims, at a meeting of all of the housekeeping and laundry department employees held shortly after the representation hearing in February 1994, advised them that a schedule had been made up reducing their work hours and that this was an administrative decision. Wright and Rodriguez also testified to being told by Sims that a scheduling decision had been made to reduce their work hours. Redding testified that the scheduling changes were being proposed in order to provide better housekeeping and laundry department coverage for the facility.

b. *Discussion and analysis*

However, as noted above, Sims did not testify at this hearing and the record is totally insufficient to show that any of these proposed changes would have brought about the additional coverage that Redding testified was the objective. It is undisputed that none of the proposed reductions in hours were implemented. However, I do conclude that by threatening to reduce the working hours of employees, Respondent was acting in a retaliatory fashion because of their having engaged in union activities and, with respect to Wright and Rodriguez, because of their having attended the representation case hearing.

10. Withdrawing employees of the month award

a. *Facts*

Rodriguez testified that shortly after the representation case hearing in February 1994, he was told by Sims that he had been nominated for employee of the month for February. This award provided a plaque normally posted at the facility and a cash award of $25. It is undisputed that Rodriguez was selected for the award and that the plaque for him was ordered and received. However, Rodriguez was not given the money and the plaque was not posted. Rodriguez testified that he was told by Sims that the plaque was not given to him because Kay had expressed reservations to Redding about giving the award to a union supporter. Kay did not testify about this matter and Sims, as noted above, did not testify at all.

Redding testified that he made a decision to terminate the ''Employee of the Month'' award because he felt that the award singled out individual employees over other employees. He further testified that since the facility was being refurbished, there was no place to hang the plaque and further, that he had discontinued the award in other nursing homes where he had been the administrator.

Redding testified that the award had been discontinued a month earlier and that an employee named Coberly had been selected but was not given an award plaque. However this testimony is intrinsically suspect. It seems unlikely that a program would have been discontinued and thereafter, at a later date, another employee, Rodriguez, would be selected for the award.

b. *Discussion and analysis*

I conclude that Rodriguez' undisputed testimony that he was told by Sims that he was being denied the award and plaque because Kay had objected to the award being made to a union adherent is sufficient to constitute an 8(a)(1) violation of the Act, regardless of whether or not discrimination in fact actually occurred.

11. Disciplinary action—Rodriguez

a. *Facts*

As noted above, Rodriguez attended the representation case hearing involving the unit in this case. He testified that he was not subpoenaed as a witness by either Respondent or

[9] The allegation of an 8(a)(1) violation in par. 13(a) by ''more closely scrutinizing their work'' is essentially subsumed within the ''monitoring'' allegation of that paragraph.

[10] The complaint (par. 13(a)) was amended at the hearing to allege a ''threat'' to change the time of scheduled lunchbreaks rather than an actual ''change'' in the scheduled lunchbreaks.

Union but attended to accompany his friends. He was inside the hearing room only once and Respondent's attorney questioned his presence. He responded that he had not come as a witness. He left when the testimony began.

About a week later, as set out above, both he and Wright were told by Redding that Redding would personally be checking rooms for cleanliness and sometime later on May 17, Sims issued a written notice to Rodriguez critical of his room cleaning and reciting that the family of a resident had complained that a room had not been cleaned for 3 days. Rodriguez refused to sign the disciplinary action.

b. *Discussion and analysis*

Based on this record, I am satisfied that Rodriguez was in attendance at the representation case hearing and that this was an indication to Respondent that Rodriguez supported the Union. The announcement by Administrator Redding that he intended to personally inspect patient rooms, which I have found violated Section 8(a)(1), was followed by the disciplinary action issued to Rodriguez in May.

In my opinion, the special attention given to the housekeeping department was occasioned not by any need or desire to improve the job performance of the housekeeping department, but it was a response to Respondent's perception that Wright and Rodriguez were supporting the Union. The record is totally devoid of any probative evidence or documentation of deficiencies within the housekeeping department which would account for the threats and the disciplined administered. Indeed, it could not be otherwise since the head of the housekeeping department and the immediate supervisor of those employees, who also administered the discipline to Rodriguez, was not called as a witness.[11]

12. Imposition of more onerous working conditions

a. *Facts*

Wright and Rodriguez both testified that shortly after the representation hearing, in February 1994, Sims began to require that they move patient beds outside the facility for cleaning. This was a departure from past practice where the beds had been washed inside the facility. This was a more difficult and onerous procedure and it disrupted the activities in other departments with respect to patient care. It is undisputed that these instructions were rescinded shortly after they were imposed.

b. *Discussion and analysis*

Redding testified that this requirement was simply another example of mismanagement by Sims. However, Sims did not testify and his motives remain undisclosed. In my opinion, the inference is fully warranted, absent any satisfactory explanation, that this departure from the normal practice was retaliatory and prompted by the appearance of Wright and Rodriguez shortly prior thereto at the representation case hearing.

[11] While I conclude that Rodriguez was identified as a union supporter because of his attendance at the representation case hearing, I do not conclude that his discrimination was for ''giving testimony'' in violation of Sec. 8(a)(4) of the Act. In any event, such a finding would add nothing to the remedy.

13. Coercive statements concerning employees' rights to representation

a. *Glenda Gregory*

(1) Facts

Gregory testified that on the morning of July 6, almost a month after the election had been held on June 8, she went to work and discovered that new, unwashed linen had been placed for use in the linen closet without first having been washed. Apparently, feeling that this was a mistake, she reported it to Linda Glover, staff development coordinator, who asked her who had put it there and Gregory told her that she assumed it had been done by night-shift personnel.

Later in the morning, Redding spoke to Gregory about the matter. Gregory testified that prior thereto, she went to get her ''union steward,'' Jennifer Edwards,[12] and they all met with Redding. According to Gregory, she was assured by Redding that she would not need a shop steward. At this point, Edwards left and Redding met alone with Gregory.[13] According to Gregory, she was told by Redding that ''[i]t wasn't no such thing as a Union; no such thing as a Union in Florida; and that they did not have a contract with the Union.''

Redding's version was that he wanted to speak to Gregory simply to tell her that there was no problem about using new linen on the floor without washing it, and told her that no disciplinary action was being considered and that there was no need for Edwards to be there as a witness. Gregory concedes being told that no disciplinary action was going to be taken. It is undisputed that no disciplinary action was taken either then or later.

(2) Discussion and analysis

Under Board law, an employer has a right to the presence of a shop steward at any interview where disciplinary action is being contemplated. However, the record herein makes it clear, regardless of Respondent's knowledge about Edward's shop steward status, that disciplinary action was not contemplated and Edward's presence was not legally mandated.

I further conclude that Redding's remarks about the unions did not violate Section 8(a)(4) since they were intended basically to convey the fact that the Union and Respondent had not yet negotiated a contract.

b. *Kathy Mullins*

(1) Facts

Mullins testified that on about June 22 or 23, 1994, she was called by Redding to his office and told by him that he knew she was a shop steward and that she was not allowed to act as a shop steward in representing employees in the absence of a contract between Respondent and the Union and that she was to so inform the other shop stewards. According

[12] It does not appear that any of the unit employees had yet been identified to Respondent as shop stewards. Redding testified that he first learned who the shop stewards were from Mullins, who identified herself as a shop steward, in about September or October 1994. At about that time, he was also sent a union flier identifying the shop stewards.

[13] Edwards was not called as a witness.

to Mullins, she told Redding that she had been told by the Union that when the employees won the election, they won the right to representation. Redding responded that he did not know where the Union had gotten their information.

Redding testified that Mullins represented herself to him as a ''witness'' for employees, not as a shop steward, and that he did not become aware of any shop stewards until he saw, months later, a union pamphlet naming the shop stewards. Redding denied telling Mullins or any other employee representing themselves as shop stewards that they could not represent employees.

(2) Discussion and analysis

Having reviewed the relevant testimony, I conclude that Mullins offered the more credible account and I find that Redding did tell Mullins that shop stewards could not represent the employees in the absence of a contract. This misrepresentation of the employees' right to representation violated Section 8(a)(1) of the Act. Mullins' actual status as shop steward at the time is irrelevant. These statements made to her or to any employee would have constituted prohibited employer interference.

14. Discharge of Kim Stanton

a. *Facts*

Stanton was hired by Respondent as a CNA in June 1993. During the union organizational campaign, she served on the Union's organizing committee and attended 10 to 15 union meetings for employees, including the first one in November 1993. She wore two union buttons on her uniform daily, from February 1994 until she was discharged on May 31, 1994.

In February 1994, during the course of her employment on the a.m. (7 a.m. to 3 p.m.) shift on station II, she was assigned to perform nursing care two or three times a week for a patient named Oliver Riggs, who suffered from Parkinson's disease and was often confused and disoriented.

Stanton testified that on the afternoon of March 27 at about 1:30 or 2 p.m., she was told by Charge Nurse Marian Woods[14] to take Riggs to the toilet. According to Woods, she also told Stanton to get assistance in taking him. Stanton testified that she either did not hear or was not told to get assistance. Having reviewed the relevant testimony, I find based on the credibility considerations set out above in footnote 1, that Stanton's testimony was more credible, particularly where she had been caring for Riggs since the beginning of her employment, and such detailed instruction on the method of accomplishing such a common duty would seem to have been unnecessary.

Upon getting Riggs on the toilet, Stanton noticed that he was wet and went to get a ''soaker'' for him.[15] When she returned, Riggs had fallen or slipped from the toilet seat to the floor. Stanton went to get Woods and, after checking to be sure Riggs was not hurt, put him back into his chair. Nothing was said to Stanton about the incident and she worked until the end of the shift.

Stanton was off on May 28 and 29. She worked on May 30 although nothing was said to her about the matter until May 31. On that date, she was told by Charge Nurse Jerry Smith to write an account of the incident. She did so. Prior to the end of her shift, she was directed by Smith to go to DON Kay's office. There she was met by Kay and Woods. Kay told Stanton she was being fired and read to her from a typewritten ''Performance Conference Report,'' inter alia, as follows:

> On 5/27, Marion Woods requested that Kim take the same resident to the bathroom twice. After the second request, Kim stated that ''She knew how to do her job.'' Marion also instructed Kim at this time to get assistance in taking the resident to the bathroom because he would need assistance due to the fact that he had been sitting in a gerilounger all day. Kim proceeded in taking the resident to the bathroom by herself. She left the resident alone in the bathroom to go to the linen cart and obtain a dry soaker. When she returned to the bathroom the resident was lying on the floor in front of the toilet.
>
> Kim is being terminated at this time due to insubordination in not following the nurse's direction and neglect for not meeting the resident's needs.

Kay told Stanton she could also speak to Redding if she chose. After Stanton got home, she called Redding and arranged to meet him at the facility at 10 p.m. She prepared a statement of the incident for Redding. However, after reading Stanton's statement, Redding told her that he agreed with Kay and that she was discharged.

Stanton concedes that she did not seek out another employee to assist her in transporting Riggs to the toilet. Stanton testified that with respect to Riggs, she used assistance at some times, and not at other times, as the activity and condition of the patient dictated. Stanton, whose testimony in this regard I credit, stated that she had never been told by any management official or seen any documentation requiring two-person assist in any transfer of Riggs.

The ''Alternative Flow Sheets,'' the basic documents used by CNAs setting out the care to be afforded each patient, as well as the ''Comprehensive Care Plan'' and the ''Restorative Therapy Program Progress Notes,'' show that therapy by arm-in-arm for short distances was a part of Riggs' therapy program, but nothing in any of these documents, except the ''Comprehensive Care Plan,'' patient care plan, alludes to transfers with the assistance of two persons. The ambulation mentioned was a part of Riggs' program for therapy and did not deal with the matter of how Riggs was to be transferred.

While the ''Comprehensive Care Plan'' appears to provide for a two-person assist to transfer, Stanton, whose testimony I credit in this regard, stated that she was not involved in the formulation of Riggs' care plan and does not normally consult either the ''Comprehensive Care Plans'' or the ''Restorative Therapy Program Progress Notes'' for patients under her care although she did have access to them in the patient chart behind the nursing desk. The basic documents used by Stanton and all the CNAs are the alternative flow sheets listing the patient care duties as to each patient, each of which is

[14] Subsequent to the incident, Woods became Marian Woods Price by marriage.

[15] Apparently, a ''soaker'' is an absorbent pad used for incontinent patients.

initialed by the CNA. This document does not mandate that Riggs be transferred by two people.

Howard Martin, a CNA, was employed from December 6, 1993, to April 1, 1994, on the first shift on station II where he was assigned patient care for Riggs about 1 week out of every 2 or 3 weeks. Like Stanton, who apparently worked with him until his termination, Martin testified that he was never told that Riggs was a two-person transfer and that he had always moved Riggs by himself except for one occasion when he asked for assistance in bathing Riggs.

With respect to prior discipline, it appears that Stanton was first cited for poor job performance in a ''Performance Conference Report'' dated February 25, and again on April 12.

Respondent also introduced a ''Notice of Disciplinary Action'' citing a failure of patient care. Stanton testified that she had not seen this document, and I credit her testimony, particularly since there were no witness signatories attesting to her refusal to sign as provided for on this form.

On October 18, 1993, Stanton received a satisfactory performance review containing favorable comments.

(2) Discussion and analysis

In order to establish its case, the General Counsel must show that stanton was engaged in union activity; that the Respondent was aware of that union activity; and that Stanton was discharged because of that union activity.

A review of the facts discloses that Stanton was, from the outset, a strong union adherent. Since she was open and active about her support for the Union, there can be no doubt that Respondent was aware that she supported the Union.

In the early afternoon of May 22, Stanton's charge nurse, Woods, told her to take Riggs to the toilet. Pursuant to this instruction, she took Riggs to the toilet in a geri/lounger. After having been put onto the toilet, Riggs fell off while Stanton was occupied with getting him a ''soaker.'' Stanton called Woods who came to the scene. Riggs, apparently unhurt, was replaced in his geri/lounger. Nothing was said about the incident nor disciplinary action imposed until May 31, at which time Stanton was called into Kay's office and summarily discharged for insubordination to a supervisor and neglect of a patient.

Respondent argues that Stanton was remiss in refusing to obey Woods' instruction to obtain assistance in transferring Riggs to the toilet. In this regard, I have credited Stanton in concluding that she was either not so instructed or did not hear any such instruction. With respect to the contention of neglect, I cannot conclude that Stanton was charged with the knowledge that the ''Comprehensive Care Plan'' provided for a two-person transfer. She had not been told that Riggs required a two-person transfer, and the evidence does not show that CNAs were required to incorporate the contents of the ''Comprehensive Care Plan'' into their patient care responsibilities. Stanton was not otherwise aware that a two-person transfer was required and her basic operating document, the ''Daily Flow Sheet,'' had no such notation.[16]

I also note that while the Respondent contended in its brief that Riggs' fall from the toilet was occasioned by Stanton's failure to adhere to Woods' instruction for a two-man transfer, the evidence does not show any causal relationship between Riggs' fall from the toilet and his one-person transfer to the bathroom.

With respect to Stanton's prior discipline, it is not clear whether these Performance Conference Reports were in fact disciplinary. It does not appear that any disciplinary action was taken and, viewed in overall context, does not constitute sufficient justification to support Stanton's discharge in view of the factual considerations reached herein.

In short, I conclude that Respondent seized upon the Riggs' incident, shortly prior to the election, to rid itself of an active union adherent and that the reasons, ''insubordination'' and ''neglect,'' advanced by Respondent were pretexts disguising antiunion motivation. In applying a *Wright Line* analysis to this case, I conclude that the General Counsel has made a prima facie showing sufficient to support the inference that Stanton's activity on behalf of the Union was a motivating factor in Respondent's decision to terminate her and that the Respondent has not demonstrated she would have been discharged even in the absence of her union activity.[17]

15. Discharge of Jill U'Ren and Redding's 8(a)(1) statements

a. *Facts*

Jill U'Ren was a CNA hired by Respondent on February 15 to work the third shift. It does not appear that apart from her attendance at some union meetings, that U'Ren was a particularly active union adherent. She testified that she had been requested to wear both prounion and proemployer buttons but had declined to do so, stating that she did not feel that it was appropriate to wear buttons for either side at the workplace, nor does the record disclose that U'Ren had signed an authorization card for the Union. Both Redding and Kay testified that they had no knowledge that U'Ren was engaged in any union activity.

On June 28, 1994, U'Ren injured her ankle while off duty and was unable to work. On July 6, she went to Redding's office to request a leave of absence. According to U'Ren, she was told by Redding that she was not eligible for a leave of absence since she had not yet been employed for 6 months as required under company policy.

Respondent's ''Employer Handbook'' provides under ''Leaves of Absence,'' in relevant part:

> A leave of absence may be requested by an employee upon completion of six (6) months of continuous employment.
>
> Not counting vacation, any planned absence in excess of two weeks requires an approved leave of absence. In the case of any unplanned absence due to illness, injury or death in the family, a leave of absence must be requested and approved if the absence extends beyond two weeks. However, if at that point, a return is anticipated within days, you need not be put on LOA status. If a return date is uncertain or predictably a ways off, an LOA is necessary.

[16] The facts that the ''Alternative Flow Sheets'' and the ''Restorative Therapy Program Progress Notes'' provided for two-person ambulation as a part of a therapy program is immaterial to the issue.

[17] *Wright Line*, 251 NLRB 1083 (1980).

U'Ren complained that another employee named Laura Lee had been granted a leave of absence although she had not been employed 6 months. According to U'Ren, Redding replied that ''they used to do that a long time ago, but they had to go strictly by policy now, because everything was scrutinized, with the Union, and they couldn't—they just don't do that anymore.''

With respect to Lee, it appears that she did not expect her absence, due to the illness of her father, to extend beyond a week from April 8 and thus, under the LOA provision noted above, no LOA needed to be approved. She returned on May 2, having been given time off, according to Redding, rather than a LOA.

Redding also testified that another employee with a family emergency, CNA Rhonda Kempski, an employee with less than 6 months of service, had been obliged to resign because she was not eligible for an LOA. Kay testified that CNA Loriann Henry also had resigned because of family illness because she was ineligible for a LOA.

U'Ren declined to resign, and she was terminated for absenteeism on July 6.

Redding, in his testimony, did not respond specifically to U'Ren's version of what was said during his conversation with her. However, Redding did deny telling any employee that he would have to enforce the policies of the Company more strictly because the employees had selected union representation. To the extent that their accounts vary, I find that U'Ren's account of the conversation to be more specific and credible.

b. *Discussion and analysis*

I have concluded, in essence, that Redding told U'Ren that because the Union had been selected to represent the employees, the Company's policies were therefore under scrutiny by the Union and therefore company policy, including the written company policy would have to be strictly observed. This remark was coercive since, by implication, Redding was conveying a general message that prior company practices which did not strictly conform to company policy would be discontinued because of the Union, essentially depriving employees of a benefit previously enjoyed.

However, in order to establish that U'Ren was discharged unlawfully, the General Counsel needs to show that U'Ren was discharged because the Respondent, on account of the Union, followed a more strict enforcement of its LOA policy than it had prior thereto in order to discharge U'Ren. This, the General Counsel has not done.

First, in evaluating the matter of company knowledge, it is clear that U'Ren was not an active union adherent nor does the record establish that Respondent otherwise became aware that U'Ren was a union supporter. Nor is this record sufficient to infer any knowledge of U'Ren's limited union activity to the Respondent.

Nor has the General Counsel established that there was any deviation from the Company's past practice in denying U'Ren an LOA. While it is true that Lee had been employed less than 6 months, the record shows no substantial departure from established policy regarding LOAs since her unplanned absence was not intended to exceed 2 weeks and did not require an approved LOA.

Moreover, it appears that company policy, as written, was applied not only to U'Ren but to CNAs Rhonda Kempski and Loriann Henry.

In summary, I conclude that U'Ren was not eligible for a leave of absence and that she was lawfully terminated under existing company policy for absenteeism when she did not resign.

16. Discipline of Richard Smith

a. *Facts*

Richard Smith was employed by Respondent as a CNA in February 1993. Smith was an active union supporter. After the election on June 8, he began to wear a union button at work and he served on the union negotiating committee. He left Respondent's employ in November 1994.

Smith testified that shortly after the election, he was issued a written disciplinary warning for eating from the tray of a patient. Smith concedes having eaten off the tray but argues that the disciplinary action was discriminatory because others who had eaten from patient trays had not been disciplined for that behavior.

Redding testified that there was a company policy against eating off the trays of patients because of infection control and public image considerations. Further, that several employees had been disciplined for doing so. The General Counsel witness Cindy Magnus and Kathy Mullins both agreed that eating off patients' trays was not permitted.

In a second incident, on July 14, Smith was issued a disciplinary action for failing to take proper care of a patient named Gill. Linda Shattuck, patient care coordinator for the facility, testified that she was called to Gill's room upon the complaint of his wife at about 11:50 a.m. Shattuck observed that Gill had scrambled eggs and orange juice on his gown and bedding. Shattuck spoke individually to the two aides who had been assigned to the room, Smith and other CNA named Rosemarie Paolino.[18] Both denied any culpability. Since both were responsible, Shattuck issued each a disciplinary action. Shattuck theorized that the incident was caused by the failure of Smith and Paolino to divide their responsibility to cover the room.

Smith, the General Counsel's only witness, testified that Gill was not his patient but Paolino's and that, nonetheless, since Gill's wife was coming and he knew her to be a very demanding person, he went in to ''straighten him up'' at about 11:20 a.m. Smith testified that he did not at that time see the soiled condition alluded to by Shattuck.

b. *Discussion and analysis*

It is undisputed that the Respondent was aware that Smith was a union supporter. However, in order to establish a violation of Section 8(a)(3) of the Act, the General Counsel must show that the ''disciplinary action'' taken by Respondent was motivated by Smith's union activity. This was not done.

The record discloses that Shattuck was summoned by Gill's wife to Gill's room because of his soiled condition.

[18] The complaint alleged a violation of Sec. 8(a)(3) of the Act in Respondent's discharge of Paolino in connection with this incident. However, Paolino was not called as a witness and, upon motion by the General Counsel, Paolino was amended out of the complaint.

After learning that the responsibility for Gill's room belonged to both Smith and Paolino as a ''team assignment,'' Shattuck confronted them. Both denied any responsibility for Gill's care. In these circumstances, Shattuck decided that it was appropriate to give both a disciplinary action. Paolino, whose testimony would have been useful, was not called and Smith, the General Counsel's only witness, testified only that he had no responsibility to care for Gill. The record adduced by the General Counsel is totally insufficient to establish the disciplinary action was motivated as a response to Smith's union activity.[19]

Likewise, with respect to the alleged disciplinary action for eating from a patient's tray, it is unclear from this record whether or not a disciplinary action was ever issued. The General Counsel produced none at hearing. But even assuming that one was issued, it would appear to have been justified since Smith admits that he had eaten from a patient's tray and the record shows that others had been disciplined for the same reason.

This record is not sufficient to show that eating from patients' trays was condoned by the Respondent, nor has the General Counsel shown that Smith was treated differently from other employees for this infraction.

17. Posting of noncompliance letter and Respondent's withdrawal of contract proposals and recognition

a. *Facts*

By letter dated July 19, 1995, John W. Martin, Respondent's director of labor relations, wrote to Seddon:

> We have been advised by the State of Florida of the following:
>
> 1. That the United Health Care Employees Union is not a registered labor organization, as required by Chapter 447 of the Florida statutes, a second degree criminal misdemeanor; and
> 2. That you, Jack Seddon, are not a registered business agent, as required by Chapter 447 of the Florida statutes, also a second degree criminal misdemeanor.
>
> While the State of Florida also advised us that as a result of these violations of Florida law, we have no obligation to deal with you or your organization until you are in compliance with these requirements, please state your positions on these matters and how you intend to comply.
>
> Once again it appears that the cavalier attitude evidenced by the union in non-complying with the law may adversely affect our residents, our employees and our business. I sincerely hope this does not continue.

On about the same date, the letter was posted by Respondent on a glass enclosed employee bulletin board.

At approximately this time, a bargaining unit ward clerk named Judy Sanford began to circulate for signature a petition among the employees reading: ''We, the employees of Hillhaven do not wish to be represented by Mr. Seddon so here we petition.''

Sanford testified that she was aware that the letter had been posted but did not pay much attention to it, and that the motivation for the circulation of the petition was what she felt was the manner in which picketing union employees had portrayed those unit employees working within the facility as not providing appropriate patient care. She mentioned specifically a television broadcast wherein pickets described patient neglect resulting from understaffing and showed a union representative declaring his intention to bring the problems to the public by picketing the facility.

After having obtained a substantial number of signatures on the petition, Sanford, along with two other employees, went to a motel where union contract negotiations were being conducted. According to Sanford, she went to hear the other side ''just in case I was wrong'' before making a decision on whether to submit the petition to management.

When Sanford got to the motel, she met with Seddon, Magnus and other union representatives involved in the contract negotiations. Upon inquiry by Sanford, Seddon, and Magnus attempted to explain what the Union was seeking to accomplish on behalf of the employees. Sanford asked if she could attend the negotiating sessions and was told by Seddon that she could not. She also asked if she could speak to the Hillhaven negotiators so she ''could get both opinions'' and was told, according to her testimony, that she would be ''arrested'' if she did. Seddon, who testified and whose testimony I credit in this regard, denied telling her that she would be arrested, but rather told her that a meeting with management might place Respondent ''in a position where they could be prone to have an unfair labor practice filed against them.''

On the following day, at the facility, she went to Redding's office and presented him with the petitions set out above. She testified that the petitions referenced ''Seddon'' rather than the Union because she was aware that Seddon was the head of the Union and did not know the name of the Union, but that it was her intention to refer to the Union in the petition.

In this regard, Seddon testified that the ''parent'' or ''umbrella'' organization for the State of Florida is the ''Federation of Physicians and Dentists/Alliance of Health Care and Professional Employees.'' There are several divisions within the ''Federation of Physicians and Dentists/Alliance of Health Care and Professional Employees,'' and one of those is the ''United Health Care Employees.'' It appears that the ''United Nurses of Florida'' is a division of the ''United Health Care Employees.''

Further, it appears that the ''Federation of Physicians and Dentists'' is affiliated with the National Union of Hospital and Health Care Employees (NUHHCE), which, although itself a national Union, is affiliated as a matter of necessity with the American Federation of State, County and Municipal Employees (AFSCME) in order to, itself, belong to the AFL–CIO. The petition in the companion representation case was filed by ''United Health Care Employees'' and that Union was certified, without any mention of the ''United Nurses of Florida'' (UNF). Seddon testified that he is executive director of the Federation of Physicians and Dentists.

Redding testified that he received the employee petition with 36 signatures thereon on July 24, 1995, which was the

[19] In reaching this conclusion, I credit Shattuck's testimony that she did in fact find Gill in a soiled condition when she was called to the room by Gill's wife.

first of 3 days of scheduled negotiating sessions, at about 5 or 6 p.m.[20] Redding further testified that he wrote the date on the petition at the time that he received it, which date appears thereon as July 24, 1995.

Two additional petitions were submitted by Sanford on July 25, 1995, one with a single signature and another with five signatures thereon. A single petition dated July 28, 1995, was submitted later in the month. After receipt of the petitions, Redding made signature comparisons with the tax withholding forms to verify the signatures of the signatory employees.

On the following day, Respondent and the Union returned to the negotiations. However, after a conversation between Seddon, Martin, and the Federal mediator, negotiations were suspended.[21]

Seddon's chronology of events is somewhat different. Seddon recalled that he was told by the Federal mediator that management did not want to meet and Elmore suggested that Seddon draw up new proposals, which he did. Both Seddon and Magnus testified to the appearance of Sanford and her coworkers, Annie Shankin and Mary Martin, at the contract negotiations. Seddon testified that Sanford complained about Magnus' representing the employees at the negotiating table and that Seddon went over the outstanding contract proposals with her for some 45 minutes to an hour. After this, the three employees went to the management quarters and came out some 15 minutes later. Shortly thereafter, Elmore told Seddon that Martin wanted to speak to him and a meeting was held between Martin, Elmore, and Seddon wherein Martin told Seddon that he had a decertification petition from the employees and needed to consult counsel and had no further proposals at that time.

The parties met the following day. Martin, Seddon, and Elmore again met, and Martin took the position that in view of the decertification petition, Respondent would not continue to bargain. He asked Seddon if he were willing to accept the petition and ''go away with grace.'' Martin also offered to go to another election monitored by Elmore. These options were unacceptable to Seddon, and the negotiations ended.

By letter dated August 15, 1995, from Martin to Seddon, the Union was advised that based on having received a petition to decertify the Union, signed by a majority of the unit employees, the Respondent had no choice but to withdraw its contract proposals.

By letter dated September 5, 1995, Seddon identified to Redding the Union's ''official authorized stewards'' and stated that the Union continued to be prepared to bargain. By letter dated September 7, 1995, Martin wrote to Seddon stating:

> I am in receipt of a copy of your letter to Leo Redding dated September 5, 1995 (copy enclosed).
>
> On behalf of the Hillhaven Rehabilitation Center of Cape Coral, please be advised that based on objective considerations your Union does not represent a majority of employees in the certified bargaining unit.
>
> Therefore, we no longer recognize your Union as the collective bargaining representative of our employees.

As noted above, Martin did not testify, but Redding testified that he participated in drafting this letter and that the reference to ''objective considerations'' included, in addition to the petitions, comments from various employees to the effect that they no longer wanted to be represented by the Union.

Redding testified that Yolonda Romero, a CNA, told him on July 24, 1995, after Redding had received the petition, that she wanted to sign the petition, and Redding allowed her to do so. On July 25, 1995, Redding was approached by alleged discriminatee Hector Rodriguez who told Redding that he felt that the Union was unfairly portraying the employees at the facility.[22] Over the next few days, he spoke to many employees, including Mary Gordon and Harvey Powers, who all registered with Redding their desire not to be represented by the Union and in these conversations they referred to the Union and not to Seddon personally.

b. *Discussion and analysis*

Under existing Board precedent, the Union is entitled, during the year following its certification to an irrebuttable presumption of majority status. Thereafter, that presumption is rebuttable, and lawful withdrawal of recognition may be accomplished by a showing either that the Union no longer represented a majority of its employees in the unit or that it had a good-faith doubt, based on objective considerations, that the Union continued to represent a majority of the unit employees. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 527; *Burger Pits, Inc*., 273 NLRB 1001 (1984), enfd. 785 F.2d 796 (9th Cir. 1986).

In the instant case, it is apparent that on July 24, 1995, and for some days thereafter, Sanford, a unit employee provided to Respondent petitions with signatures totaling some 43 unit employees.[23] The record discloses that on August 3, the unit consisted of 69 employees. Redding testified that he compared the names against W-2 forms to check their validity. The General Counsel does not dispute the validity of the petition, and I conclude that as of July 24, 1995, the Union no longer represented a majority of the unit employees.

But the General Counsel argues that whatever the record may show as to majority sentiment on August 3, 1995, Respondent has failed to show majority disaffection later, at the

[20] Having reviewed the relevant portions of this record, I conclude that Redding's testimony concerning the date and the time that he received the petition is credible, and I credit his testimony over Sanford's testimony to the effect that she gave him the petition in mid-August.

[21] Neither Martin nor the Federal Mediator James Elmore was called as witnesses.

[22] Rodriguez's signature appears on the petition.

[23] While the General Counsel attacks the validity of the petition based on its failure to identify the Union, rather than Seddon, I conclude, based on the evidence set out above and the entire record, that references to Seddon, who was the executive director of the ''umbrella organization,'' Federation of Physicians and Dentists, adequately represented the intention of the employees to decertify the Union. In this regard, I note that Seddon was the high profile union representative and chief negotiator representing the Union at the representation case hearing and clearly prominent as representing the Union. Moreover, the Union's multiple affiliations made it difficult to describe. Indeed, the name of the Union filing the unfair labor practice charges includes an organization called ''United Nurses of Florida,'' while the certification does not. Seddon was also well known as the principal union representative.

time it formally withdrew its contract proposals and refused further negotiations on August 15 and 16, 1995, or at the time it sent its letter of September 7, 1995, formally withdrawing recognition.[24]

Based on the following analysis, I conclude that Respondent, at the time it withdrew its contract proposals and recognition, did in fact have a good-faith doubt concerning the Union's majority status.

Turning to the question of good-faith doubt of majority status, the General Counsel contends that any good-faith doubt was tainted by the letter sent to Seddon and posted on July 19, 1995, reciting the failures of Seddon and the Union to register with the State of Florida as required by Florida State law. The General Counsel contends that the posting of this letter violates Section 8(a)(1) of the Act, and further that it was this unfair labor practice that caused the employee disaffection, resulting in the decertification petition. This being the case, the Respondent could not offer the petition to support any good-faith doubt of majority status.

I do not agree. First, based on this record, I cannot conclude that posting the July 19, 1995 letter violates Section 8(a)(1) of the Act. Neither the General Counsel nor the Union produced any evidence to show that the representations made in the letter were false. Further, the record does not show that the letter was posted to undermine the negotiations nor the Union's majority status nor does the record show that any employees were influenced by the letter in signing the petition. Nor does the record show that the letter contributed to employee dissatisfaction.

It is more likely that the reason for the employee disaffection was a feeling among unit employees that they were being portrayed by employee pickets and union representatives on television and in picketing, as providing inferior patent care, apparently missing the distinction that the Union was attempting to convey; that it was Respondent's understaffing rather than poor job performance by employees that was causing the alleged inferior patient care.

In summary, I conclude that even assuming that the posting of the letter was coercive, which I do not, and that it did violate Section 8(a)(1), I could not, on this record, conclude that there was any causal relationship between the posting of the letter and the employee disaffection, resulting in the decertification petition.

I conclude that the decertification petition presented to Respondent on July 23, 1995, constituted a sufficient objective basis for a reasonable doubt of the Union's continued majority status and that the subsequent withdrawal of its outstanding contract proposals and withdrawal of recognition from the Union did not violate Section 8(a)(5) of the Act.

### 18. Postwithdrawal of recognition—allegations

#### a. *Facts*

The record discloses that after Respondent withdrew recognition from the Union, Cynthia Magnus, representing the Union, called Redding in about November 1995 and requested a meeting on grievances relating to unit employees. Magnus also telephoned Administrator Bill Samson, asking him to meet on an employee's grievance. Both declined to meet with Magnus on the grounds that the Union no longer represented the unit employees. Also, in December 1995, Respondent's business office issued a notice to all employees, including unit employees, to the effect that medical and dental insurance premiums would be increased 10 percent over the 1995 rates. This was done without notice to or consultation with the Union.

#### b. *Discussion and analysis*

Having concluded that Respondent was entitled to withdraw recognition from the Union based on its bona fide good-faith doubt of the Union's majority status, I further conclude that neither Respondent's action in declining to meet to discuss grievances nor its announcement of an increase in insurance premium rates without consulting the Union violated Section 8(a)(1) and (5) of the Act.

### 19. Postrecognition withdrawal 8(a)(1) allegations—Suzanne Sloat

#### a. *Facts*

Suzanne Sloat, a CNA on the day shift (7 a.m. to 3 p.m.), testified without rebuttal that in late November 1995, she overheard a conversation between Kelly Scott, dietary/-kitchen department head, and CNA April Henderson wherein Scott told Henderson that the reason the CNAs were not getting a raise was that raises were frozen on account of the Union.

#### b. *Discussion and analysis*

Clearly this remark is violative of Section 8(a)(1) of the Act since it is unlawfully coercive. It interferes with the right of employees to form, join, or assist labor organizations, in violation of those rights guaranteed in Section 7 of the Act. This is true even though Respondent had been entitled to withdraw recognition from the Union based on its good-faith doubt of the Union's majority status.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent as set forth in section III above, in connection with Respondent's operations described in section I above, have a close and intimate relationship to traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent discharged Cynthia Magnus and Kimberly Stanton for reasons which offended the provisions of Section 8(a)(3) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided herein with interest shall be computed in the manner described

[24] While there is conflicting testimony with regard to dates, I conclude that Sanford gave Redding the original petitions on July 24, 1995, and that it was on August 15, 1995, that Respondent withdrew its contract proposals and declined to negotiate further.

in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co*., 90 NLRB 289 (1950).

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Cynthia Magnus and Kimberly Station, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By imposing more onerous working conditions on employees Carol Wright for having appeared at a representation case hearing, Respondent violated Section 8(a)(4) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[Recommended Order omitted from publication.]